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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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ROBERT J. PERSINGER, JR.,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF JOB SERVICE and CONTINENTAL WESTERN INSURANCE COMPANY,

Respondent-Appellants.

Filed August 26, 1980

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Appeal from Polk District Court - Ray Hanrahan, Judge.

Agency appeals from district court's reversal of its denial of unemployment benefits, asserting 1) that petitioner's moral objections to spraying of chemical herbicides and fertilizers do not constitute a sufficient basis for refusing to accept otherwise suitable employment and 2) that substantial evidence in the record supports the agency finding that petitioner did not know the job referral he refused would have required spraying of chemical herbicides or fertilizing. AFFIRMED.

Walter F. Maley and Blair H. Dewey of Des Moines, Iowa, for respondent-appellants.

Robert C. Oberbillig of Des Moines, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Respondent, Iowa Department of Job Services, appeals from district court's reversal of its denial of unemployment benefits, asserting 1) that petitioner's moral objections to spraying of chemical herbicides and fertilizers do not constitute a sufficient basis for refusing to accept otherwise suitable employment and 2) that substantial evidence in the record supports the agency finding that petitioner did not know the job referral he refused would have required spraying of chemical herbicides or fertilizing. We affirm.

On March 8, 1976, petitioner, Robert J. Persinger, was discharged as a grounds keeper at Continental Western Insurance Company for refusing to spray a pre-emergent herbicide on the lawn. His refusal was based on a moral and ecological belief that use of chemicals was harmful to people, plants, and animals. Respondent denied petitioner three weeks' unemployment benefits for misconduct and denied any further compensation for his refusal of a job referral to Pingrey Spray Service. These decisions were affirmed administratively and by the district court on judicial review.

Upon further appeal, the Iowa Court of Appeals affirmed respondent's denial of unemployment benefits for three weeks due to job misconduct, but found that work requiring petitioner to violate his moral standards was not "suitable work." The court then remanded petitioner's cause "for hearing and fact-finding by the Iowa Department of Job Service on whether Persinger was justified in claiming to know that he would be required to spray chemicals on lawns" when he refused the Pingrey Spray Service referral.

Upon re-hearing and fact-finding, respondent affirmed its original decision of April 14, 1976, disqualifying Persinger from benefits for refusing a referral to Pingrey Spray Service. Petitioner's appeal to the district court for judicial review alleged that the agency decision lacked support by substantial evidence in the record as a whole and that the hearing officer's decision was arbitrary and capricious. The district court, in reversing the agency decision, held 1) that the decision of the Court of Appeals as to the proper interpretation of "suitable employment" was binding on the district court, 2) that the agency's hearing officer and appeal board erred in ignoring the testimony of Genevieve Davis, an agency employee, regarding her interview with petitioner, 3) that the job description related by the agency's employee to petitioner provided petitioner with justification to know he would be required to spray chemicals on lawns, 4) that the record on the whole lacked substantial evidence to support the decision of the hearing

officer and appeal board, and 5) that the findings of the hearing officer and appeal board that petitioner had no knowledge of the chemical spraying requirements of the job were arbitrary. Respondent brings its appeal from this decision.

I. Scope of Review. Our review of district court's order reversing the agency's denial of unemployment benefits is at law. § 17A.20, The Code 1979; Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429 (Iowa 1979); City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978).

The district court in its exercise of section 17A.19 review powers acted in an appellate capacity to correct errors of law specified for contested cases in section 17A.19(8)(f). This court's review is limited then to the sole question of whether the district court correctly applied the law. To make that determination, we ask whether the agency action is supported by substantial evidence in the record before the agency when the record is viewed as a whole. § 17A.19(3)(f). City of Des Moines v. Iowa State Commerce Commission, 285 N.W.2d 12, 14 (Iowa 1979). We are limited to the record made before the hearing officer. § 17A.19(7). Farmer's Elevator Company, Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979). If our conclusions are the same as district court's, affirmance is in order; if not, reversal may be required. Jackson County, 280 N.W.2d at 430.

II. Suitable Employment. Respondent alleges that petitioner's beliefs are not religious beliefs and employment with Pingrey Spray Service would not be a risk to his morals. We agree with petitioner that the doctrine of issue preclusion bars further litigation of this issue. Matter of Evans, 267 N.W.2d 48 (Iowa 1978). The issue of petitioner's beliefs and suitable work was earlier raised in this court and decided in petitioner's favor.[1] Because respondent did not apply for further review of that decision, this court's interpretation of "suitable employment" was final and binding on remand proceedings. § 684.36(2), The Code 1979. See § 684.1(4), The Code 1979. We also find that this issue was not raised on remand during the agency proceedings or before the district court. Consequently, we give it no consideration. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 286 (Iowa 1979); City of Davenport, 264 N.W.2d at 311; Hoffman, 257 N.W.2d at 25.

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[1] Persinger v. Iowa Dept. of Job Services, No. 60378 (Iowa Ct. App., filed Mar. 29, 1978).

III. Substantial Evidence. Respondent also argues that district court erred in finding a lack of substantial evidence in the record to support the agency's decision. We must review the record to determine whether our conclusions are the same as those of district court.

Evidence is considered substantial when "a reasonable mind would accept it as adequate to reach a conclusion." City of Davenport, 264 N.W.2d at 311. In determining substantiality of evidence, we "must take into account whatever in the record fairly detracts from its weight." Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, 488, 71 S.Ct. 456, 464-65, 95 L.Ed. 456, 467-68 (1951). However, the possibility that two inconsistent conclusions can be drawn from the evidence does not mean an agency's findings are unsupported by substantial evidence. Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979).

On remand, the hearing officer focused briefly on the question of petitioner's knowledge at the time of referral to Pingrey Spray Service and found that petitioner did not know what the job duties would be. The decision stated that the job order "may have" included spraying or fertilizing, but that the extent and nature of the job would not be known until the applicant discussed it with the employer. The hearing officer's findings, however, emphasized that, because of petitioner's belief, he would have turned down any job referral to Pingrey Spray Service and that he had effectively withdrawn from the labor market. Neither of these conclusions was relevant to the agency's charge on remand.

The question on remand was whether petitioner was justified in concluding that the job referral involved use of chemical sprays. We believe that he was. The record contains extensive testimony by the agency's employee, Genevieve Davis, on the issue of petitioner's knowledge of the referral to Pingrey Spray Service, including chemical spraying. A summary of Ms. Davis's testimony shows: that she read the job description to petitioner, saying that it could include using sprays and fertilizers in addition to other duties; that she recalled petitioner's contention about having to apply fertilizer as the reason for refusing the referral; that in her opinion, petitioner understood the job entailed the possibility of spraying of chemicals and fertilizer; that the job order was comprehensively written to provide applicants with as much detail of job requirements as possible; and that the job order was a general overall order that would have included the use of fertilizers as a job duty. Further, the record shows the only referral made to petitioner was to this job that included spraying in its work description.

We find petitioner made the required showing—that he was justified in concluding that the job duties at Pingrey Spray Service would require him to act contrary to his legal rights. Petitioner was not required to know the exact nature of the referral. The hearing officer and appeal board erred in disregarding the significant and substantial testimony of Genevieve Davis. We agree with district court's finding that the agency action is unsupported by substantial evidence in the record viewed as a whole. § 17A.19(8)(f). District court's judgment therefore is affirmed.

AFFIRMED.

All judges concur except Donielson, J.

There was substantial evidence in the record before the agency to support the agency's action; I, therefore, dissent from the majority's holding otherwise.

The precise issue facing the hearing officer on remand was whether petitioner was justified in concluding the job referral involved use of chemical sprays. The agency's hearing officer found the claimant did not know on the date of the referral, April 2, 1976, the potential job included spraying or fertilizing or that he would be required to spray or apply chemicals. A careful reading of the record shows substantial evidence for this finding. The agency interviewer who notified petitioner of this job testified she informed petitioner the potential duties of the job would include mowing, pruning, planting, and trimming, in addition to spraying and fertilizing. This general job order did not specify the exact duties the job would entail and these would not have been known until petitioner had talked with the employer. At best, petitioner would be justified only in concluding the job referral "might" or "could" involve chemical spraying or fertilizing. Petitioner seeks to support his action by asserting he knew the main function of the employer was chemical spraying. Yet when pressed, he produced no factual basis for his assumption that the employer's main function was chemical spraying. Petitioner did not know for a fact he would be required to apply the chemicals.

This court earlier remanded this case to determine whether petitioner was justified in concluding the job referral involved chemical spraying. It is apparent from the record, petitioner concluded, not from a factual basis, but from his own unsupported assumptions and beliefs the job would involve chemical spraying. At the very least, petitioner should have talked to the employer to determine whether the job did in fact involve chemical spraying. The burden of such a requirement is so slight, I fail to see how the majority can reasonably conclude it is not necessary to require him to do this. When petitioner was faced with this general job description, he would be justified in concluding the job involved chemical spraying only after an interview with the employer. To require anything less of petitioner is to ignore the intent of the unemployment insurance laws and to allow a person to use personal beliefs to circumvent reasonable and necessary requirements of the law. § 96.4-3, The Code 1979.

The record viewed as a whole provides substantial evidence to support the agency's action; § 17A.19(8)(f), The Code 1979; the majority in affirming a reversal of that action is improperly substituting its judgment for that of the agency.